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Utah Supreme Court

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IN THE UTAH SUPREME COURT

LPI SERVICES and/or TRAVELERS)	
INDEMNITY CO. OF CONNECTICUT,)	
)	
Petitioner / Defendants)	
)	
vs.)	
)	Utah Supreme Court Case No.
MICHAEL MCGEE, and the UTAH)	20080063-SC
LABOR COMMISSION,)	
)	Utah Court of Appeals
Respondents.)	Case No. 20070077-CA
)	

BRIEF OF RESPONDENT MICHAEL McGEE

LPI Services v. Labor Commission, 2007 UT App 375

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INCORPORATION AND JOINDER OF RESPONDENT'S BRIEF

Mr. McGee incorporates by reference the Brief of Respondent Labor Commission, with attachments, as if fully set forth herein. Respondent McGee joins the Labor Commission in opposing LPI's appeal for the reasons stated in the Labor Commission's Brief, and those set forth below.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 63G-4-403, and § 78A-3-102.

STATEMENT OF ISSUES & STANDARD OF REVIEW

Issue 1: Whether the Court of Appeals correctly reviewed Rule 612-1-10.D.1.c for abuse of discretion, where the Commission was commanded to determine whether work was "reasonably available" to Mr. McGee considering *inter alia* his "past work experience"?

Standard of Review: Under this Court's decision in *Morton Int'l v. Tax Comm'n*, 814 P.2d 581, 586 (Utah 1991), this Court should review the Commission's judgment for abuse of discretion, pursuant to Utah Code Ann. § 63G-4-403(3)(h)(i), and it should uphold Rule 612-1-10.D.1.c if it is within the bounds of reasonableness. *King v. Indus. Comm'n*, 850 P.2d 1281 (Utah App. 1993).

Preservation of this issue for review: LPI raised this issue before the Commission, thereby preserving it for review. (R 154-156).

Issue 2: Whether the Commission correctly determined that the Commission acted within its statutory authority when it promulgated Rule 612-1-10.D.1.c?

Standard of Review: This Court should review for abuse of discretion because the Commission's authority to promulgate the Rule turned on whether the legislature conferred discretion to the Commission to interpret the statute. As noted under Issue 1, under this Court's decision in *Morton Int'l v. Tax Comm'n*, 814 P.2d 581, 586 (Utah 1991), this Court should review the Commission's judgment for abuse of discretion, pursuant to Utah Code Ann. § 63G-4-403(3)(h)(i), and it should uphold Rule 612-1-10.D.1.c if it is within the bounds of reasonableness. *King v. Indus. Comm'n*, 850 P.2d 1281 (Utah App. 1993).

Preservation of this issue for review: LPI raised this issue before the Commission, thereby preserving it for review. (R 154-156).

CONSTITUTIONAL OR STATUTORY PROVISIONS

1. The determinative statute is Utah Code Ann. § 34A-2-413(1)(c)(vi)(1997):
 - (c) To find an employee permanently totally disabled, the commission shall conclude that:
 - ...
 - (iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.

Utah Code Ann. § 34A-2-413(1)(c)(vi)(1997) (emphasis added).

2. The determinative rule is R612-1-10(1)(c)(1):

(1) Other work reasonably available: Subject to medical restrictions and other provisions of the Act and rules, other work is reasonably available to a claimant if such work meets the following criteria:

...
c. The work provides a gross income at least equivalent to:

(1) The current state average weekly wage, if at the time of the accident the claimant was earning more than the state average weekly wage then in effect;

R612-1-10 1. c.(1).

STATEMENT OF CASE

Course of the Proceedings: Mr. McGee permanently injured his low back and shoulder when he helped lift a 600 pound plus motor at work. Mr. McGee filed an application for hearing, seeking permanent total disability benefits as a result of his industrial injuries.

The ALJ applied the Rule, which considered Mr. McGee's wages at the time of the accident. Pursuant to the wage considerations of the Rule, the ALJ found that Mr. McGee was entitled to an award of permanent total disability benefits. LPI submitted a re-employment plan to the ALJ, who approved the plan. On appeal, LPI challenged only the validity of the Rule, arguing that it conflicted with the statute, and that the Commission therefore exceeded its statutory when it promulgated the Rule.

The Legislature commanded that the Commission determine if work was "reasonably available" to permanently totally disabled employees, when it considered the

five listed factors. Utah Code Ann. § 34A-2-413(1)(c)(iv). One of the factors was “past work experience.” *Id.* Because LPI did not challenge the underlying facts, and because only the wage portion of the Rule was implicated in the ALJ’s award of benefits, only the Rule’s wage considerations were at issue, and were central to the issues on appeal.

Nature of the Case: This Court agreed to review two issues: (1) whether the Court of Appeals correctly reviewed the Labor Commission’s Order for abuse of discretion; and (2) whether the Court of Appeals correctly concluded that the Commission acted within its statutory authority to promulgate the Rule at issue. R612-1-10.D.1.c.

The Court of appeals affirmed the Commission’s Rule as a valid exercise of implied discretion. The Court held that the Legislative implicity conferred discretion to the Commission when it changed the Commission with determining if work was “reasonably available” to injured employees. The Court also held that the Rule was a valid exercise of statutory authority because the Rule was consistent with the statute.

LPI argued that the Legislature’s use of the term “reasonably available” did not confer discretion to the Commission, and that this Court should use a correction of error standard of review. It also argued that the Rule conflicted with the statute.

This case turns on whether the Legislature conferred discretion to the Commission. It also turns on whether considering “past work experience” includes consideration of employees’ wages when they were part of the employees “past work experience.”

If the Legislature conferred some measure of discretion to the Commission to interpret the statute, then this Court must review the Rule for abuse of discretion. But if the term “reasonably available” conferred no discretion to the Commission, this Court must determine if considering “past work experience” included consideration of employees’ wages. If the plain meaning of considering “past work experience” included considering employees’ wages as part of their experience, then the Rule – which considered wages as part of “past work experience” – was consistent with the statute, and the Commission acted within its statutory authority.

If the term “past work experience” is ambiguous, then this Court must look to the purpose, history, and structure of the Act to determine if the Rule’s consideration of wages was reasonably subsumed in consideration of “past work experience.”

The Commission has discretion to determine what “reasonable” means in the context of § 34A-2-413(1)(c)(iv). It also has discretion to determine whether consideration of wages may be considered under its duty to consider employees’ “past work experience.” The Commission’s judgment on that issue, as embodied by Rule 612-1-10.D.1, and as applied to Mr. McGee’s award of permanent total disability benefits, should be upheld by this Court.

STATEMENT OF FACTS

In November 2002, McGee filed an Application for Hearing seeking various Workers' Compensation benefits related to a July 2001 industrial injury with LPI Services. (R.0002.)

In August 2003, McGee filed an Amended Application seeking permanent total disability compensation. (R. 00025.) Defendants' vocational expert testified that McGee was capable of working as a lens stylist with a starting wage of \$7.00 per hour, plus commission of \$2.50 per hour or more and income potential of between \$12.00 to \$13.00 per hour; or as a car rental reservationist with a starting wage of \$7.29 per hour, plus commissions of \$2.50 per hour or more and income potential of between \$12.00 to \$13.00 per hour. (R. 0040.)

In April 2004, the ALJ issued his Findings of Fact, Conclusions of Law, and Order. (R. 0033-48). McGee earned \$17.50 per hour at the time of the alleged injury. (R. 0034, 0040-41.) The average weekly wage for the State of Utah was \$13.86 per hour. (R. 0040-41.) Because McGee's wages on the date of accident exceeded the current state average weekly wage, and the jobs paid a wage lower than the state average weekly wage, they violated the Rule. (R. 0033-0048.) The two jobs located by Mr. Eversen, defendants' vocational expert, at most paid \$13.00 per hour, or less than the average weekly wage for the State of Utah as of July 4, 2001. (R. 0045.) The ALJ determined that "no evidence existed that any employment remained reasonably available to Mr.

McGee as of the date of the hearing pursuant to the requirements of Utah Code § 34A-2-413(a)(c)(iv) and Utah Administrative Code R.612-1-10.D.1.c (R.0045.) The ALJ concluded that McGee was permanently and totally disabled.

In April 2004, the defendants filed a notice of intent to file a reemployment plan, which was filed in May 2004. (R.0049-50; R. 0053-72.) In September 2004, an evidentiary hearing was held with respect to the reemployment plan. (R.0143.) In February 2005, the ALJ issued Findings of Fact, Conclusions of Law, and an Order, wherein the defendants' reemployment plan was determined to be reasonable designed to return McGee to gainful employment. (R.0143-147.)

Defendants timely filed a Motion for Review contesting the ALJ's determination that pursuant to the administrative rule, McGee is permanently and totally disabled. (R.0154-67). McGee opposed the Motion for Review, claiming that the consideration of gross income, available wage rates, and the current state average weekly wage rate "did not 'abridge, enlarge, extend, or modify'" the five statutory criteria. (R. 0170.)

In December 2006, the Commission affirmed the ALJ's decision. (R.0193-97.) The Labor Commission admittedly took a "broader view of the statutory term 'past work experience'" than defendants (R.202.)

A timely Petition for Review was filed with the Utah Court of Appals. The parties disagreed over the applicable standard of review. Defendants insisted that whether an administrative rule conflicts with a statute is a question of law that involves no fact

finding and no application of any facts to law, and therefore no deference is given to the agency. McGee and the Labor Commission argued for an abuse of discretion standard, claiming that the Labor Commission should be given discretion to determine whether rules that it promulgates conflict with state statutes.

The Court of Appeals held that the Labor Commission had been given implied discretion to interpret the statute because the statute required the Commission to determine if work was “reasonably available,” taking into account the five listed factors. The Court of Appeals reasoned that the statute “implicitly granted the Commission deference” to interpret the statute because “[t]he Utah legislature did not and has not defined what the term ‘reasonably’ means in the context of this statute.” *LPI Servs. v. Labor Comm’n*, 2007 UT App. 375 at ¶ 15.

SUMMARY OF ARGUMENT

This Court should conclude that the Court of Appeals correctly reviewed for abuse of discretion. The legislature implicitly conferred discretion to the Commission to interpret the permanent total disability statute when it charged the Commission with determining whether work was “reasonably available,” in considering the five listed factors.

The portion of the Rule at issue considered one of the five factors: “past work experience.” This Court should uphold the Rule if it concludes that “past work experience” plainly included employees’ wages as part of their “past work experience.”

This Court should also uphold the Rule if it finds that the term “past work experience” was ambiguous. This Court should reasonably construe consideration of “past work experience” to include consideration of employees wages for two compelling reasons. First, every type of compensation payable under the Act requires consideration of employees wages as a precondition to payment of compensation. Second, the purpose and history of the Act were consistent with consideration of employees’ wages in permanent total disability claims,

This Court should uphold the Rule as a valid exercise of legislative authority – either because considering employees’ wages is plainly part of their “past work experience” when employees were paid wages for their work, or because the Commission reasonably interpreted “past work experience” consistent with the structure, purpose and history of the Act.

For these reasons, this Court should uphold the Court of Appeals’ decision, and deny LPI’s appeal.

ARGUMENT

I. Because The Statute Required The Commission to Determine Whether Work Was “Reasonably Available” To Mr. McGee, The Court of Appeals Correctly Reviewed The Commission’s Rule for Abuse of Discretion.

The permanent total disability statute conferred implied discretion for the Commission to interpret whether work was “reasonably available” to Mr. McGee, taking into consideration his “past work experience.” Utah Code Ann. § 34A-2-413(1)(c)(iv). Accordingly, this Court should conclude that the Court of Appeals correctly reviewed for abuse of discretion.

Appellate Courts defer to agency interpretations where the statute confers discretion to the agency. “Appellate courts defer to an agency’s statutory interpretation only when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language. (citations and internal punctuation omitted).” “*Utah Standards of Appellate Review – Revised*,” Judge Norman H. Jackson, Utah Bar Journal, Vol. 12, No.8, October 1999.

In *Morton International*, this Court observed that:

grants of discretion may be implied from the statutory language. For example, we have held that when the operative terms of a statute are broad and generalized, these terms bespeak a legislative intent to delegate their interpretation to the responsible agency. We have also granted an agency’s statutory interpretation deference when the statutory language suggested that the legislature had left the specific question at issue unresolved.

814 P.2d at 590.

In this case, the legislature directed the Commission to determine if work was “reasonably available” to Mr. McGee, taking into consideration *inter alia* his “past work experience.” The Legislature did not define “reasonably” in the Workers Compensation Act, and is subject to multiple plausible interpretations. The Legislature’s use of the term “reasonably” “bespeaks a legislative intent to delegate [its] interpretation to the responsible agency.” *Morton*, *Id.*

The Court of Appeals correctly concluded that the language of the statute conferred implied discretion to the Commission: “[B]ecause ‘reasonably’ is a broad and generalized term that has ‘multiple permissible interpretations,’ the Commission’s expertise and experience in making sound policy decisions is necessary to interpret the meaning of the phrase ‘other work reasonably available.’” *LPI* ¶ 16 (internal citations omitted). This Court should conclude that the Commission correctly reviewed for abuse of discretion because the legislature implicitly conferred discretion when it required the Commission to determine if work was “reasonably available” to Mr. McGee.

This Court’s opinion in *Martinez v. Media-Paymaster Plus / Church of Jesus Christ of Latter-Day Saints*, 2007 UT 42, 164 P.3d 384, shed no light on the standard of review for the case at bar. The issue in *Martinez* was whether the Court of Appeals correctly reviewed the Commission’s factual findings for abuse of discretion or substantial evidence. *Id.* ¶ 22. This Court held that the Commission’s findings of

whether work was reasonably available were factual determinations, *Id.* ¶ 32, and were reviewed for substantial evidence. *Id.* ¶ 35. In contrast, LPI argued that *Martinez* restricted the Commission's discretion based on statute's five listed factors, Brief at 20. But it cited as support this Court's analysis of reviewing findings of fact for substantial evidence, *Martinez* at 32. *Martinez*, however, did not address the standard of review for the Rule at issue. LPI also argued that under *Martinez*, subsection (c) only gave the Commission discretion to make findings of fact, and to determine if the facts satisfied the statute. Brief at 17. Curiously, the Brief quoted *Martinez*'s burden of proof analysis as support for a correction of error standard of review.¹ The Brief contained other novel

LPI's Brief argued that this Court's *Martinez* decision governed the standard of review in this case, Brief at 17, but then cited as authority the part of the opinion that addressed the employee's burden of proof. The Brief contained the following quote from *Martinez* under its standard of review section:

We . . . hold that the language of subsection (c) grants the Commission authority to determine only whether the facts presented meet the statute's requirements for a finding of permanent total disability. *Id.* at ¶ 42 (emphasis added).

Brief at 17. But the next sentence of *Martinez* stated, "[The language of subsection (c)] does not bestow on the Commission the authority to allocate the burden of proof." *Martinez* at ¶ 42 (emphasis added). The Brief took this Court's quote out of context: This Court was not considering the standard of review – but the employee's burden of proof. *Martinez* did not address the standard of review for the Rule at issue. Instead, this Court must determine whether the statute conferred discretion to the Commission when it required the Commission to decide if work was "reasonably available" to injured employees, and whether the Rule is a reasonable exercise of that discretion.

arguments in support of a correction of error review.² But reviewing for agency discretion is a well-developed body of law. As shown above, if the legislature conferred discretion to the Commission, this Court must review the Rule for abuse of discretion.

This Court should hold that the legislature conferred implied discretion to the Commission when it directed the Commission to determine whether work was “reasonably available” to Mr. McGee. This Court should uphold the Court of Appeals’ review of the Rule for abuse of discretion, and deny LPI’s appeal.

² For example, the *Esquivel* case cited was distinguishable from the case at bar because it did not involve a statutory grant of discretion – much less a Rule based on that discretion. *Esquivel v. Labor Comm’n*, 2000 UT 66, ¶ 19, 7 P.3d 777, 781.

Another example was its argument that the legislature’s wholesale change of permanent total disability requirements in 1995 was actually an effort to “curtail the commission’s prior authority to promulgate rules.” Brief at 19. But pre-1994 permanent total disability claims had fundamentally different requirements than post-94 claims: pre-1994 claims followed the substance of the Social Security’s sequential decision making process. Accordingly, before the law changed in 1995, the legislature allowed the Commission to adopt Rules that followed that sequential decision making process. Utah Code Ann. § 35-1-67. But after the legislature changed the requirements for permanent total disability claims, there was no point to authorize the Commission to draft Rules that followed the old law. Removing the pre-1994 rulemaking statute was a housekeeping measure – not an effort to rein in the Commission. To the contrary, the Brief admitted that the Commission has the statutory authority to draft rules consistent with the Act. Brief at 19. But none of these novel arguments shed light on whether the legislature’s use of “reasonably available” work conferred discretion to the commission to interpret the statute.

II. The Labor Commission Was Authorized to Promulgate the Rule Because The Rule Was Consistent With the Statute.

This Court should hold that Rule 612-1-10.D.1.c was consistent with § 34A-2-413(1)(c)(iv), and affirm the Court of Appeals' decision. *LPI Services v. Labor Commission*, 2007 UT App. 375. To prove entitlement to permanent total disability benefits, injured employees must prove that work is not "reasonably available" to them. Utah Code Ann. §34-A-2-413(1)(c)(iv). The legislature identified five factors the Commission must consider to determine if work is reasonably available to employees: age, education, past work experience, medical capacity, and residual functional capacity. *Id.* (emphasis added). This Court observed that "these [five] factual considerations inform what is reasonable." *Martinez*, ¶ 32. Citing *Martinez*, the Court of Appeals noted that "the term 'reasonably' implies a judgment informed by a set of facts." *LPI* ¶ 17.

To facilitate these factual determinations, the Commission promulgated the Rule, which defined "reasonably available" work in pertinent part: "The work provides a gross income at least equivalent to the current state average weekly wage" R612-1-10.D.1.c. While the Commission must consider employees' "past work experience," the legislature did not define that term under § 413. The Commission interpreted the term "past work experience" to include wages. Accordingly, the Rule considered employees' wages as part of its "reasonable availability" analysis. R 612-1-10.D.1.c. The essence of the parties' dispute is whether consideration of "past work experience" includes consideration of employees' wages.

If the plain language of the statute included consideration of wages, then this Court must uphold the Rule as consistent with the statute. Alternatively, if “past work experience” was ambiguous, then this Court should construe that the term to include employees’ wages when they were part of their “past work experience.” In either case, the Rule was consistent with the statute, and this Court should affirm the Court of Appeals’ decision.

A. Where Employees Were Paid Wages For Their Past Work, Their Wages Were Plainly Part of Their “Past Work Experience.”

The plain meaning of “past work experience” included wages where they were part of an employee’s “past work experience.” This Court first considers the plain meaning of the statute. *Robinson v. Mount Logan Clinic*, 2008 UT 21, ¶ 9, 182 P.3d 333, 335. Webster’s dictionary defines **past** as: “1 a: ago <12 years past> b: just gone or elapsed <for the past few months>”; **work** as: “(1) activity in which one exerts strength or faculties to do or perform something (a): sustained physical or mental effort to overcome obstacles and achieve an objective or result (b): the labor, task, or duty that is one’s accustomed means of livelihood”; and, **experience** as: 1 (a): direct observation of or participation in events as a basis of knowledge (b): the fact or state of having been affected by or gained knowledge through direct observation or participation.”³ In other

³ *Merriam Webster’s Online Dictionary*;
<http://www.merriam-webster.com/dictionary/past>
<http://www.merriam-webster.com/dictionary/work>
<http://www.merriam-webster.com/dictionary/experience>

words, if an employee participated in work that paid wages, then those wages are part of her “past work experience.” The plain language of the statute encompassed consideration of wages as part of the employees’ “past work experience.”

This Court should consider all of the words chosen by the legislature, and not just those defined in LPI’s Brief. Courts presume that the Legislature used each statutory term advisedly, and must try to harmonize the statute by giving effect to each clause and word in the statute. *State v. Tooele County*, 2002 UT 8, ¶ 10, 44 P.3d 680 (cited by LPI with approval at 38). But LPI’s Brief omitted most of the definition of “past work experience.” The Brief included only the definition of “experience,” and omitted the definitions of “past” and “work.” Brief at 43. By failing to define all of the words in the entire term, the Brief ignored the specific words chosen by the Legislature. Instead, “past work experience” plainly includes employees wages where wages were part of their “past work experience.”

This Court should conclude that the Rule was consistent with the Statute. The Commission was authorized to promulgate rules consistent with the Statute. Utah Code Ann. §§ 34A-1-301 and 304. Because “past work experience” plainly subsumes employees’ wages when they were part of their “past work experience,” this Court should uphold the Rule as a valid exercise of statutory authority.

B. If “Past Work Experience” Was Ambiguous, This Court Should Reasonably Interpret That Term To Include Employee’s Wages, Consistent With The Purpose, History, and Structure of the Act.

Alternatively, if this Court finds the term “past work experience” was ambiguous, then the purpose and structure of the Act shows that employees’ wages must be considered in determining their rights to permanent total disability compensation. “When interpreting an ambiguous statute, we first try to discover the underlying intent of the legislature, guided by the meaning and purpose of the statute as a whole and the legislative history.” *Bluffdale Mountain v. Bluffdale City*, 2007 UT 57, ¶ 70, 167 P.3d 1016, 1035 (internal citations omitted). A central purpose of the Utah Workers’ Compensation Act is to pay wage replacement compensation to injured workers. *Reteuna v. Indus. Comm’n*, 55 Utah 258, 185 P.535, 537 (1919). The Commission must “liberally construe[] and apply[] the Act to provide coverage and resolve any doubt respecting compensation in favor of an injured employee.” *Salt Lake City Corp. v. Labor Comm’n*, 2007 UT 4, ¶ 16, 153 P.3d 179.

“Past work experience” subsumes employee’s wages in the Utah Workers’ Compensation Act. The Act is premised on wage-based employment. Utah Code Ann. § 34A-2-401(1)(a).⁴ A central purpose of the workers compensation act is to pay injured workers wage replacement compensation. *Reteuna v. Indus. Comm’n*, 55 Utah 258, 185

⁴ “An employee . . . who is injured . . . by accident arising out of and in the course of the employee’s employment . . . shall be paid . . . compensation for loss sustained on account of the injury or death.” Utah Code Ann. § 34-A-2-401.

P. 535, 537 (1919) (cited with approval in *LPI* at ¶ 20).

The structure of the Act shows that wages should be considered as part of employees' "past work experience." There are five types of compensation under the Act.⁵ Each of the five compensation is specifically tied to a consideration of the employees' wages – including the permanent total disability statute. *Id.* at § 34A-2-410 through § 414. Earning wages is a precondition to receiving compensation under the Act. *Id.* Therefore, every claim for compensation necessarily includes consideration of employees' wages.

Further, the Act applies to Utah's market economy where employees earn competitive wages based on their employer's demand for their qualifications and skills. As the Court of Appeals noted, "We conclude that past work experience necessarily raises the issues associated with a competitive labor market, including wages." *LPI* ¶ 22. In contrast, excluding wage consideration ignores an essential (and for some, the most important) part of the employment relationship, to the employees' detriment, and to the employers' benefit. Considering employees' wages as part of "past work experience," on the other hand, is consistent with the purpose, history and continued viability of the Act as the employees' exclusive remedy for their work injuries. If this Court finds that "past

⁵ Under the Utah Workers' Compensation Act, the amount of temporary total compensation, § 34A-2-410, temporary partial compensation § 34A-2-411, permanent partial compensation § 34A-2-412, permanent total compensation § 34A-2-413, and compensation for death § 34A-2-414, are each tied to the employee's wages at the time of the accident or death.

work experience” was ambiguous, it should hold that employees’ wages were part of “past work experience,” and uphold the Rule because it was consistent with the statute.

The cases cited by LPI were distinguishable from this case. In *Sanders Brine Shrimp v. Audit Div. Of the Utah State Tax Comm’n*, 846 P.2d 1304 (Utah 1993), the statute at issue defined “manufacturer” by reference to the Standard Industrial Classification code. The Tax Commission’s rule imposed additional definitional elements. This Court struck down the rule because the legislature had given the Commission no discretion to further interpret the statute. In *Draughton v. Dep’t of Financial Institutions*, 975 P.2d 935 (Utah App. 1999), this Court invalidated a DHRM rule that limited protections against demotion, but were statutorily protected. This Court concluded that the rule conflicted with the statute’s scheme of protecting against demotions, and invalidated the rule.

These cases are distinguishable from the case at bar because there was no statutory grant of discretion in the former, and in the latter, the rule was inconsistent with the statute.⁶ But in this case, the legislature required the Commission to exercise its judgment in determining whether work was “reasonably available” to employees, and as shown

⁶ *Crowther v. Nationwide Mut. Ins. Co.*, 762 P.2d 1119, 1122 (Utah Ct. App. 1988), is also distinguishable because it was issued before the standard of review jurisprudence articulated in *Morton International v. Tax Comm’n*, 814 P.2d 581 (Utah 1991); *State v. Pena*, 869 P.2d 932 (Utah 1994); *King v. Indus. Comm’n*, 850 P.2d 1281 (Utah App. 1993), and others. *Crowther* did not address agency discretion and presumed that a correction of error standard applied.

above, considering “past work experience” plainly included consideration of employees’ wages as part of employees’ past work experience.

In summary, the Commission’s interpretation of the Statute as articulated in the Rule was reasonable because it was consistent with the plain language of the statute, the purpose of the Act, and the structure of the Act – which considers employees’ wages as a precondition to payment of every type of compensation. This Court should uphold the Rule as a reasonable exercise of implied discretion conferred by statute. Alternatively, this Court should uphold the Rule as consistent with the plain language of the statute, which required the Commission to consider employees’ wages as part of their “past work experience.” This Court should hold that the Commission acted within its statutory authority when it promulgated the Rule, and affirm the Court of Appeals’ decision.

CONCLUSION

This Court should affirm the Court of Appeals' decision because the Legislature implicitly granted discretion to the Commission to interpret the statute when it charged the Commission with determining if work was "reasonably available" in permanent total disability claims. The plain meaning of considering employees' "past work experience" included consideration of their wages, if that was part of their work experience. Accordingly, this Court should affirm the Rule because it was consistent with the statute, and therefore a valid exercise of statutory authority. Alternatively, if this Court finds the term "past work experience" was ambiguous, then the history, purpose and structure of the Act show that wages should be considered as part of employees' "past work experience." For these reasons, this Court should deny LPI's appeal, and uphold the decision of the Court of Appeals.

ADDENDUM

No addendum is necessary as Petitioner's LPI's Brief and Respondent Labor Commission's Brief contain all of the materials pertinent to this appeal.

SIGNATURE OF COUNSEL

DATED this 16th day of June, 2008.

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PROOF OF SERVICE

I certify that on the 16th day of June, 2008, I mailed a true and correct copy of the foregoing BRIEF, first class postage prepaid, to the following:

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